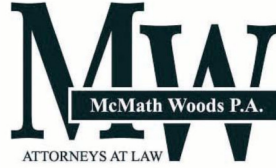


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July 1, 2014

Dough Szenher
Arkansas Department of Environmental Quality
5301 Northshore Dr.
North Little Rock, AR 72118

Re: Public Comment-Reg. 5 and Reg. 6 Rulemakings

Mr. Szenher:

This comment is on behalf of myself, and my clients, the Ozark Society and the Arkansas Public Policy Panel (“petitioners”). Please apply this comment to the rulemaking dockets which seek to prohibit the Director of the Arkansas Department of Environmental Quality from issuing permits for certain confined animal operations pursuant to APCEC Reg. 5, and certain concentrated animal feeding operations (“CAFOs”) pursuant to APCEC Reg. 6 (“the rulemakings”), in the Buffalo National River Watershed. The docket numbers for those rulemakings are 14-002-R and 14-003-R. This comment supports the rulemakings.

The Arkansas Pollution Control and Ecology Commission possess the legal authority to declare a moratorium on a certain category of permits by adopting a rule. Ark. Code. Ann. § 8-4-201(b)(4). The rulemakings request a moratorium on medium and large confined or concentrated swine operations within the Buffalo National River Watershed. The protections created by the rulemakings are consistent with the existing regulations and laws discussed below.

Medium and Large Swine Operations Definitions

The rulemakings propose a prohibition on further swine operations in the Buffalo National River Watershed which house 750 or more swine weighing 55 pounds or more, or 3,000 or more swine weighing less than 55 pounds. The petitioners drew these numbers from the definitions of medium and large swine concentrated animal feeding operations found in federal regulations. Ex. 1, 40 C.F.R. § 122.23(b)(4)(iv-v) and (b)(6)(i)(D-E). The Commission has adopted the same definition in past rulemakings. See APCEC Reg. 6.103(A)(adopting federal definitions) and APCEC Reg. 5.201.

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The history of the medium and large swine thresholds begins with the Environmental Protection Agency's ("EPA") 1973 animal confinement regulations for feedlots, which imposed regulations on facilities with 2,500 or more swine over 55 pounds, for the stated reason that this threshold "will cover the facilities which present the greatest potential for pollution control while limiting the number of applications to a manageable quantity." Ex. 2, 38 Fed. Reg. 18,000. 1976 regulation changes retained the 1973 numbers because they were "justified by studies and data." Ex. 3, 41 Fed. Reg. 11,458. The 1976 regulations also introduced regulation of medium CAFOs with 750 or more swine weighing over 55 pounds. *Id.* at 11,460.

The definitions of medium and large CAFOs remained static until 2003 changes to the CAFO regulations introduced regulation of swine under 55 pounds. EPA stated that changes in the industry necessitated a new definition because "immature swine were not a concern in the past because they were usually a part of operations that included mature animals...in recent years, these swine operations have become increasingly specialized, increasing the number of large, separate nurseries where only immature swine are raised." Ex. 4, 68 Fed. Reg. 7,176, 7,192. EPA supported its regulatory CAFO thresholds with a Technical Development Document which analyzed manure production from swine CAFOs of the size now regulated. Ex. 5.

Utilizing known definitions and thresholds promotes consistency and certainty. The rulemakings do not target small farmers which do not qualify as medium or large CAFOs. Forty years of regulatory implementation and definition support the threshold numbers used here.

The Rulemakings are Consistent with Arkansas's Water Quality Standards

The Buffalo River enjoys heightened protection pursuant to Arkansas's water quality standards. *See* APCEC Reg. 2. Water quality standards contain three parts: designated uses, water quality criteria, and an antidegradation policy. The rulemakings comport with the water quality standards established for the Buffalo River in each of these parts.

The Buffalo River's designated use is that of an "Extraordinary Resource Water." APCEC Reg. 2, Appendix D-2. Extraordinary Resource Waters are those which have the chemical, physical, and biological characteristics to support "scenic beauty, aesthetics, scientific values, broad scope recreation potential and intangible social values." APCEC Reg. 2.302(A). This is the highest designated use available to an Arkansas waterway.

APCEC Reg. 2 sets minimum water quality criteria for all waters of the state for such values as color, taste and odor, solids, toxics, and oil and grease. APCEC Reg. 2.401, *et seq.* APCEC Reg. 2 also establishes specific water quality criteria by location and ecoregion. APCEC Reg. 2.501, *et seq.* The Buffalo River is in the Ozark Highlands and Boston Mountain Ecoregions. APCEC Reg. 2, Appendix A-3 and A-11. Streams in these ecoregions enjoy the most stringent limits on temperature, turbidity, pH, Dissolved Oxygen, bacteria, nutrients, and other pollutants, of all the ecoregions in the state.

The Buffalo River is a Tier III, "Outstanding Resource Water" for antidegradation purposes. APCEC Reg. 2.203. Tier III streams "shall be protected by (1) water quality controls, (2) maintenance of natural flow regime, (3) protection of instream habitat, and (4) encouragement of land management practices protective of the watershed." *Id.* APCEC Reg.

2.203 complies with federal regulations requiring states to adopt an antidegradation policy which provides the same level of protection as the federal antidegradation policy. 40 C.F.R. § 131.6(d). The federal Tier III regulation is 40 C.F.R. § 131.12(a)(3). *See* Ex. 6. EPA interprets 40 C.F.R. § 131.12(a)(3) as follows:

EPA interprets this provision to mean no new or increased discharges to ONRWs and no new or increased discharge to tributaries to ONRWs that would result in lower water quality in the ONRWs. The only exception to this prohibition, as discussed in the preamble to the Water Quality Standards Regulation (48 F.R. 51402) permits States to allow some limited activities that result in temporary and short-term changes in the water quality of ONRW.

Ex. 7, EPA, *Water Quality Standards Handbook*, Chapter 4, Section 4.7; *see also* Ex. 8, 48 Fed. Reg. 51,400, 51,403 (clarifying that only temporary or short term degradation of Tier III waters is allowed).

Protecting the water quality of the Buffalo River by adopting the rulemakings will further the objectives and stated protections of Arkansas's water quality standards. Reduced threats from degraded water quality from runoff, and reduced threat of a catastrophic event, will protect existing uses, water quality criteria, and honor the Tier III status of the Buffalo River.

CAFO Prohibitions and Regulations in Other States

Other states have successfully enacted rules or laws restricting swine operations. Indiana, Illinois, and Minnesota specifically restrict and regulate CAFOs in karst areas. The Buffalo River's watershed largely sits atop karst topography. Indiana prohibits the construction of confined animal operation waste management systems above karst topography unless it can be shown through site-specific information that the waste management system will protect the environment. 327 IAC 19-12-2. Illinois restricts both where CAFOs may be located above karst, and imposes design requirements to eliminate seepage and other modes of pollutant transport. Ex. 9, 35 Ill. Admin. Code 506.101 *et seq.* Minnesota requires an applicant seeking to store liquid animal waste to conduct a site specific investigation in karst areas of the topographic features and soil profile. Ex. 11, Minn. R. ch. 7020.2100 subp. 4, item A. Liquid waste storage is not allowed within a certain distance of some karst features, and the overall amount of waste stored is limited if certain features are present. *Id.* at subp. 2, item A and C. Regulations in these states demonstrate karst topography presents serious management obstacles and concerns when citing liquid animal waste storage lagoons associated with CAFOs.

Nebraska takes a different approach in an effort to protect its high quality streams. Nebraska's prohibits certain animal agricultural operations in "a watershed that feeds directly or indirectly into a cold water class A stream." Ex. 12, 130 Neb. Admin. Code 9-003. A Nebraska cold water class A stream is one of high quality, capable of supporting trout. R.R.S. Neb. § 54-2421. Nebraska class A stream designation is akin to Arkansas's Extraordinary Resource Water designation, and thus receives corresponding Tier III antidegradation protection. Nebraska affords its high quality protection against degradation which these rulemakings seek to provide the Buffalo River.

North Carolina prohibits issuance of permits for swine farms that use anaerobic lagoons and land application to manage swine manure. Ex. 13, N.C. Gen. Stat. § 143-215.10I(b). Permits to operate a swine operation in North Carolina may only be issued if such a facility is designed to eliminate direct discharge, seepage, runoff, atmospheric ammonia emissions, odor, disease transmitting vectors, nutrient contamination, and heavy metal contamination. *Id.*

The Rulemakings Are Consistent with Federal Designations

The Buffalo enjoys the highest legal protections afforded by federal law for rivers. The Upper Buffalo, which flows through Forest Service property, is a National Wild and Scenic River. 16 U.S.C. § 1274(a)(135). National Wild and Scenic Rivers display outstanding values, and are “preserved in free-flowing condition, and...protected for the benefit and enjoyment of present and future generations.” 16 U.S.C. § 1271.

The Department of the Interior manages the remainder of the Buffalo River as a National Park. 16 USCS § 460m-12. The Park Service manages its parks to “conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” 16 U.S.C. § 1. The Buffalo River is our nation’s first national river.

The Buffalo River watershed also contains several wilderness areas. The Arkansas Wilderness Act of 1984 designated Forest Service properties in the watershed above Boxley Valley as the Upper Buffalo Wilderness area, and created the almost 17,000 acre Leatherwood Wilderness Area along the lower stretches of the river. 98 Stat. 2349. The Leatherwood Wilderness is adjacent to Park Service properties managed as the Lower Buffalo Wilderness Area. *See* National Parks and Recreation Act of 1978, 92 Stat. 3489. The Leatherwood and Lower Buffalo Wilderness areas constitute one of the largest, if not the largest, wilderness area in the eastern United States.

The rulemakings are consistent with existing laws, Arkansas water quality standards, and further federal management objectives. The rulemakings will protect the integrity of the Buffalo River’s water quality and aesthetic values. Thank you for accepting these comments. On behalf of myself and the petitioners, I request that the Commission adopt the rulemakings.

Sincerely,

/s Ross Noland

Ross Noland

Att.